No. 16230

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

LO BUE BROTHERS, A PARTNERSHIP; MARIO LO BUE, FRED LO BUE, AND JOSEPH LO BUE, PARTNERS; AND WILLIAM LUTHER WOODALL, DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLANT

GEORGE COCHRAN DOUB,
Assistant Attorney General,
LAUGHLIN E. WATERS,
United States Attorney,
JORDAN A. DREIFUS,
Assistant United States Attorney,
ALAN ROSENTHAL,
Attorney,
United States Department of Justice.

NEIL BROOKS,
Assistant General Counsel,
JOHN S. GRIFFIN,
DONALD A. CAMPBELL,
Attorneys,
United States Department of Agriculture.

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JURISDICTIONAL STATEMENT

The complaint in this case (R. 3–11) [1] was filed in the United States District Court for the Southern District of California, Northern Division, pursuant to the provisions of 7 U.S.C. 1952 ed. § 608a(5)–(7) of the Agricultural Marketing Agreement Act of 1937, as amended, and 28 U.S.C. 1952 ed. §§ 1337, 1345, and 1355. It is alleged in the complaint that the defendants, *i.e.*, the appellees on this appeal, hereinafter re-

[1] The references to the record are to the printed Transcript of Record on this appeal.

ferred to as defendants, "willfully" shipped navel oranges in excess of the allotments established for the defendant Lo Bue Brothers for the weekly periods from April 1, 1956, through April 15, 1956, under the provisions of the Order, as amended, Regulating the Handling of Navel Oranges Grown in Arizona and a Designated Part of California (18 F.R. 5638 *et seq.*, 19 F.R. 8129 *et seq.*, 7 CFR § 914.1 *et seq.*), thereby subjecting the defendants to liability for three times the market value of the fruit shipped in excess of the allotments (R. 3–11). The defendants, in their answer, denied liability (R. 11–19).

The judgment of the District Court dismissing the complaint was entered on July 31, 1958 (R. 91–92), and the notice of appeal was filed on September 18, 1958 (R. 92). The jurisdiction of this Court of Appeals is based on 28 U.S.C. 1952 ed. § 1291.

STATUTE INVOLVED

The Agricultural Marketing Agreement Act of 1937,[2] as amended (7 U.S.C. 1952 ed. § 601 *et seq.*),

[2] The statute (50 Stat. 246) is a re-enactment, with amendments, of various provisions in the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended, including the amendments in the Act of August 24, 1935 (49 Stat. 750). Certain sections of the Agricultural Adjustment Act of 1933 with respect to a processing tax on cotton were held invalid in *United States* v. *Butler*, 297 U.S. 1, 53–78. The remaining provisions of the Agricultural Adjustment Act of 1933, as amended by the Act of August 24, 1935, relative to marketing agreements and marketing orders were, however, separate and distinct from the sections which were invalidated in the *Butler* case, and the statutory provisions for marketing agreements and marketing orders continued in effect. *United States* v. *David Buttrick Co.*, 91 F. 2d 66, 67–69 (C.A. 1); *Edwards* v. *United States*,

authorizes the Secretary of Agriculture to issue and amend orders[3] regulating the handling of certain agricultural commodities or products thereof, including oranges. 7 U.S.C. 1952 ed. § 608c (1) and (2). The Secretary is required to give due notice of and an opportunity for a hearing upon a proposed order whenever he has reason to believe that the issuance of an order will tend to effectuate the declared policy of the Act. 7 U.S.C. 1952 ed. § 608c(3). After notice and opportunity for hearing, the Secretary shall issue an order if, *inter alia,* he finds, upon the evidence introduced at the hearing, that the issuance of the order and all of its terms and conditions will

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91 F. 2d 767, 789 (C.A. 9); *Whittenburg* v. *United States*, 100 F. 2d 520, 521 (C.A. 5). The statutory provisions in the Agricultural Adjustment Act of 1933, as amended, for marketing orders and marketing agreements were regarded by Congress as being within the plenitude of its power to regulate commerce, and by re-enacting and further amending these statutory provisions by means of the Agricultural Marketing Agreement Act of 1937 any question as to their separability, under the decision in the *Butler* case, was obviated. See, *e.g.*, H. R. Rep. No. 468, 75th Cong., 1st Sess. 2; S. Rep. No. 565, 75th Cong., 1st Sess. 2–3; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 568–571; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119–123. The decision in *United States* v. *Butler*, 297 U.S. 1, "expressly reserved the question of whether the regulation of agriculture was within the commerce power" and subsequently the Supreme Court "decided the question in favor of the congressional power." *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 259.

[3] The Secretary of Agriculture is also authorized to enter into marketing agreements with handlers. 7 U.S.C. 1952 ed. § 608b. A marketing agreement, however, is inapplicable to persons who do not sign the agreement, whereas a marketing order is applicable to all of the handling transactions which are within its terms.

tend to effectuate the declared policy of the Act with respect to the commodity. 7 U.S.C. 1952 ed § 608c(4).

The Act provides, *inter alia,* for "[a]llotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof." 7 U.S.C. 1952 ed. § 608c(6)(C). Orders may be made effective on the basis of the requisite approval by handlers and producers, and in some circumstances on the basis of approval by producers only. 7 U.S.C. 1952 ed. § 608c (8) and (9).

It is provided in § 8a(5) of the Act, that "[a]ny person willfully exceeding any quota or allotment fixed for him under * * * [the Act], and any other person knowingly participating, or aiding, in the ex-

ceeding of said quota or allotment shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States." 7 U.S.C. 1952 ed. § 608a(5). Upon the request of the Secretary, it is the duty of the several United States Attorneys, in their respective districts, "to institute proceedings to enforce the remedies and to collect the forfeitures" provided for in the Act. 7 U.S.C. 1952 ed. § 608a(7). Also, the "several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement" made pursuant to the Act. 7 U.S.C. 1952 ed. § 608a(6).

The Act provides, in § 8c(15)(A), that "[a]ny handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom." 7 U.S.C. 1952 ed. § 608c(15)(A). The handler shall thereupon be given an opportunity for a hearing,[4] and the Secretary shall make a ruling upon the prayer of the petition "which shall be final, if in accordance with law." *Ibid.* Judicial review of the administrative determination may be obtained by filing an application for

[4] An administrative petition or hearing of this nature is frequently referred to in the testimony in this case as a "15(A) petition," a "15(A) hearing," or a "15(A)." See, *e.g.*, R. 107, 121, 122, 156, 157.

review, within twenty days from the entry of the ruling, in the United States District Court in any district in which the handler is an inhabitant or has his principal place of business. 7 U.S.C. 1952 ed. § 608c(15)(B). If the Court determines that the administrative ruling is not in accordance with law, "it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." *Ibid.*

The pendency of proceedings instituted by a handler challenging the validity of an order, a provision of an order, or an obligation imposed in connection with an order shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to § 8a(6) of the Act (7 U.S.C. 1952 ed. § 608a(6)), *supra,* which authorizes the district courts specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement. 7 U.S.C. 1952 ed. § 608c(15)(B).

Section 8c(14) of the Act provides, in addition, that any "handler subject to an order * * *, or any officer, director, agent, or employee of such handler, who violates any provision of such order * * * shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided,* That if the court finds that a petition pursuant to subsection (15) of this section [*i.e.,* a petition for administrative review under § 8c (15)(A), *supra*] was filed and prosecuted by the

defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant * * *." 7 U.S.C. 1952 ed. § 608c(14).

THE ORDER

The Order Regulating the Handling of Navel Oranges grown in Arizona and a Designated Part of California[5] was issued on September 16, 1953, effective September 22, 1953, on the basis of the evidence adduced at a public hearing on the proposed program. 18 F.R. 5638 *et seq.* It was determined that the regulatory program was favored by the handlers who during the period from November 1, 1952, through July 15, 1953, handled not less than 80 percent of the volume of navel oranges covered by the order and by at least three-fourths of the producers who participated in a referendum with respect to the order,

[5] Similar regulatory programs were in effect from January 13, 1936, to May 17, 1947 (12 F.R. 2467), and from October 26, 1942, to March 8, 1952 (7 F.R. 8576; 17 F.R. 2085). A marketing agreement is also in effect with respect to the handling of navel oranges grown in Arizona and the designated part of California. The marketing agreement, however, is inapplicable to handlers who did not sign the agreement. *Supra*, fn. 3, p. 3. The marketing agreement was "executed by handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping navel oranges covered by this order) who during the period November 1, 1952, through July 15, 1953 [the representative period determined by the Secretary], handled not less than 80 percent of the volume of navel oranges covered by this order." 18 F.R. 5639.

and who produced at least two-thirds of the volume of navel oranges in the relevant production area during the specified period. 18 F.R. 5639.

The order provides[6] for the establishment of a Navel Orange Administrative Committee consisting of eleven members to assist in the administration of the regulatory program and to make recommendations to the Secretary with respect to volume and size regulations. 7 CFR §§ 914.20–914.51, 914.63. The production area with respect to which the order is applicable includes the State of Arizona and that part of the State of California south of the 37th Parallel (7 CFR § 914.4), and the production area is divided into four prorate districts (7 CFR § 914.66). Whenever the Secretary finds, from the recommendations and information submitted by the administrative committee, or from other available information, "that to limit the quantity of oranges which may be handled in each prorate district during a specified week will tend to effectuate the declared policy of the Act, he shall fix such quantity" of oranges that may be handled.[7] 7

[6] The order (18 F.R. 5638 *et seq.*) was amended on August 1, 1954 (19 F.R. 2941 *et seq.*), but in the main the original order was in effect during the periods involved in this case. The amendatory action relates to procedural or administrative aspects of the program, and the substantive provisions of the original order are the relevant regulatory requirements in this case. Hence the term "order" is used, in this brief, as referring to the regulatory provisions which are relevant here (18 F.R. 5638 *et seq.*, 19 F.R. 8129 *et seq.*, 7 CFR § 914.1 *et seq.*).

[7] Elaborate findings of fact were made by the Secretary with respect to the various regulatory requirements in the order. 18 F.R. 4708–4722. It was found, *inter alia*, by the Secretary that "producers exert strong pressures upon handlers to ship

CFR § 914.52. Similarly, size regulations may be issued by the Secretary applicable in each prorate district. 7 CFR § 914.64.

Each person who has oranges available for current shipment is required to make application for a prorate base to the administrative committee, and the administrative committee fixes, in accordance with the criteria set forth in the order, the prorate base for each person who is entitled thereto. 7 CFR § 914.53. Whenever the Secretary fixes the quantity

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their fruit. It is extremely difficult for operators of packinghouses to ignore such pressures" and the order "provides a means to withstand such pressures to ship and thereby to adjust the quantity of fruit shipped to that required in marketing channels. In addition, the * * * [order] makes readily available to handlers knowledge of the quantity which is to be shipped each week, as well as more accurate knowledge of the quantity of fruit available in and enroute to consumer markets. Moreover, receivers of California-Arizona navel oranges would be provided with a basis for maintaining their commercial operations in the light of information with respect to the rate at which supplies will be made available to them." 18 F.R. 4710. "Such conditions do not exist in the absence" of this regulatory program and "handlers, in the absence of some program providing restraint of shipments * * * ship excessive quantities because of desires of producers to pick their fruit and thereby avoid losses through damage or deterioration in the groves. Moreover no individual handler or group of handlers successfully can increase the level of prices by reducing shipments because other handlers can nullify such action by increasing their shipments accordingly." *Ibid.* The ultimate finding was made by the Secretary that the order "is needed to effectuate the declared policy of the act by establishing orderly marketing conditions for navel oranges grown in the production area through providing a means of limiting the quantity of such oranges that may be shipped each week to commercial fresh channels." *Ibid.*

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of oranges which may be handled during any week in a prorate district, the administrative committee calculates the allotment of each person on the basis of the prorate base of the person and the total quantity of oranges grown in the district which may be handled during the week. 7 CFR § 914.54. Provisions in the order relate to overshipments, undershipments, and allotment loans between handlers, with appropriate adjustments in subsequent allotments. 7 CFR §§ 914.55–914.57. Administrative regulations, pursuant to the order, are also in effect. 18 F.R. 5645 *et seq.*, 19 F.R. 8136 *et seq.*, 7 CFR § 914.100 *et seq.*

STATEMENT OF FACTS

The defendants, *i.e.*, the appellees on appeal, Mario Lo Bue, Fred Lo Bue, and Joseph Lo Bue are partners operating as growers, handlers, and shippers of navel oranges in Tulare County, California, which is in Central California in the area designated by the Secretary of Agriculture as Prorate District 1 (R. 20, 79–80).[8] Their packing plant, at Lindsay, California, is operated as a partnership under the trade name of Lo Bue Brothers (R. 20, 79). William Luther Woodall, also a defendant-appellee, is the sales manager for Lo Bue Brothers (R. 20, 79–80).

Four geographical prorate districts are established under the regulatory order (7 CFR § 914.66), and the Secretary of Agriculture fixed the quantity of navel oranges which could be handled in Prorate District 1 during the period beginning at 12:01 a.m.

[8] Many of the significant facts in the case are set forth in the stipulation of facts (R. 19–50) and the supplemental stipulation of facts (R. 51–62).

on April 1, 1956, and ending at 12:01 a.m. on April 8, 1956, at 277,200 cartons (Navel Orange Regulation No. 81, 21 F.R. 2037; R. 21, 81). Also, the quantity of navel oranges grown in Prorate District 1 which could be handled during the weekly period beginning at 12:01 a.m. on April 8, 1956, and ending at 12:01 a.m. on April 15, 1956, was fixed at 231,000 cartons (Navel Orange Regulation No. 82, 21 F.R. 2267; R. 21–22, 81).

A prorate base and allotment were fixed for Lo Bue Brothers for the two weekly periods involved in the case (R. 22–23, 81–82), and during the period from 12:01 a.m. on April 1 to 12:01 a.m. on April 8, 1956, Lo Bue Brothers was permitted to handle, under the order, 12,363 cartons of navel oranges (R. 22–23, 82) but Lo Bue Brothers shipped 35,779 cartons of navel oranges during this period (R. 24, 83) or 23,416 cartons in excess of the quantity permissible under the order (R. 24, 83). Similarly, during the period beginning at 12:01 a.m. on April 8, 1956, and ending at 12:01 a.m. on April 15, 1956, Lo Bue Brothers could handle, under the order, 7,433 cartons of navel oranges (R. 23–24, 83) but on April 8, 1956, Lo Bue Brothers shipped 2,933 cartons in excess of the amount which it was permitted to ship under the order (R. 24, 83–84).

Twenty-three of the excess shipments involved in this case occurred on Saturday, April 7 (R. 24, 33–34, 84), and the three remaining shipments were on Sunday, April 8 (R. 24, 34, 84). The oranges in two of the excess shipments were sold at the time of their shipment, but the oranges in the other 24 shipments were not sold until several days later (R. 111). The com-

plaint filed by the United States prays for judgment in the amount of $149,612.22 (R. 10), which is three times the then current market value of the excess shipments (R. 24, 33–34).

An injunction proceeding was commenced on April 12, 1956, by the United States, a temporary restraining order was issued against the defendants, and on April 19, a consent decree was issued enjoining the defendants from violating the order or any lawful regulation issued under the order (R. 28, 88–89).

The excess shipments involved in this case were made by Lo Bue Brothers through William Luther Woodall, its sales manager (R. 99, 134). Mr. Woodall knew that the shipments were in excess of the allotments for Lo Bue Brothers (R. 99), and the primary issue is whether, in the circumstances, the defendants are exempt from the statutory penalties for which suit is brought.

The defendants consulted an attorney, Mr. G. V. Weikert, to determine how they could ship their excess fruit, and the attorney advised them to file a petition under § 8c(15)(A) of the Act for administrative review of the applicable allotments (R. 106–108, 121–122, 134, 156–188). The petition was signed by Mario Lo Bue on Thursday, April 5, 1956, and mailed in Los Angeles, California, by Mr. Weikert, air mail, registered, on that date (R. 25, 85, 123, 183). On Friday, April 6, Mr. Weikert said to the defendants that "by now the petition would be on file with the Secretary of Agriculture, and if they had fruit to ship in excess of their allotment they could begin the next day to make such shipments and could continue unless and until they

received an injunction or restraining order stopping them" (R. 183). However, the administrative petition was not received or filed in the office of the Hearing Clerk, in the United States Department of Agriculture, until Monday, April 9, 1956 (R. 29–30, 37–44, 62, 87), *i.e.*, after the excess shipments involved in this case.

The administrative petition under § 8c(15)(A) of the Act was filed by the defendants because they were concerned over the deterioration of the fruit which they had available for shipment (R. 106–107, 181, 206–209, 229–230). Mario Lo Bue testified that "the fact the fruit was deteriorating and dropping heavy on the ground is what made us seek this advice [from Mr. Weikert] to see whether we could ship any of this fruit. * * * We sought to get protection on these oranges that was dropping. We felt there was some law that would protect the grower from losing all this fruit * * *" (R. 106). Mr. Lo Bue further testified that the "only" reason for filing the administrative petition was "because the fruit was going bad" (R. 121). The defendants' attorney, Mr. Weikert, also said that the defendants consulted him because, as they contended, "the fruit was deteriorating and dropping" (R. 181).

Mr. Lo Bue also testified that Mr. Weikert advised that by "filing a 15(A) that we could ship these oranges and be in our rights" (R. 107). Mr. Weikert informed Mr. Lo Bue that they would "probably be served an injunction" (R. 108, 117), but Mr. Lo Bue did not expect the injunction to be

served during the weekend of April 7 and 8 when the excess shipments were made (R. 118–121).

William Luther Woodall, sales manager of Lo Bue Brothers, testified that he attended meetings of the Navel Orange Administrative Committee in Los Angeles on March 25 and March 29, 1956, representing himself (R. 136–143), and he told the Committee that he thought that Central California "was being dealt a very raw deal, * * * and I was going to see if there was a way that I could move my fruit, if there was any way possible I was going to ship my fruit" (R. 141). M. D. Street, a member of the administrative committee (R. 143–144), also testified that Mr. Woodall "made it quite clear to the Committee, as he put it, he was getting a raw deal and he intended to move his fruit, to ship his fruit in one way or another, and he would find some way to do it" (R. 145–146). Similarly, Michael Coogan, manager of the administrative committee (R. 153), testified that on March 29, 1956, after the meeting of the administrative committee, he had a conversation with Mr. Woodall, and that "Mr. Woodall said that he had a plan whereby he was going to ship his fruit, and I told him as manager he must understand it was my job to catch him if he shipped in excess of the allotment, and he said, 'Well, I ain't going to tell you what I am going to do.' And I said 'Naturally' " (R. 154).

Mr. Woodall further testified that he saw Mr. Weikert in Mr. Weikert's office in Los Angeles during March or April (R. 156–159), and Mr. Woodall asked Mr. Weikert if there was "any way,

legal right that we can move oranges. We felt our rights was being infringed; they prorated the oranges way past any other year, of the historical life of navel oranges in Tulare County, they were deteriorating very badly, bringing a dollar a box under Southern California oranges, and that was along those lines, the condition of our fruit, and if there was any way we could get relief" (R. 158). Mr. Woodall testified that his purpose in seeing Mr. Weikert was to see if there was any legal way to ship the oranges (R. 159–160), and that Mr. Weikert replied that the only way was by "filing a 15(A)," and that as "soon as the 15(A) petition was filed," they could immediately start shipping oranges (R. 160).

Mr. Weikert testified that he advised Mr. Woodall that "where a 15(A) petition is filed in good faith the order or allotment complained of is in effect suspended until there is a decision on the petition, and that the petitioner is exempted from penalties prescribed by the Act" (R. 182). Mr. Weikert also testified that Mario Lo Bue telephoned him later, with Mr. Woodall on the extension, and told him to prepare a petition under § 8c(15)(A) of the Act along the lines previously discussed with Mr. Woodall (R. 182). After the petition was prepared, Mr. Weikert telephoned Mr. Lo Bue, and Mr. Lo Bue came to Mr. Weikert's office in Los Angeles and signed the petition on Thursday, April 5 (R. 183, 186). Mr. Weikert testified that the petition was mailed on the same day to Washington, air mail, registered, and "late the next day I telephoned Mr. Lo Bue at Lindsay,

with Mr. Woodall on the extension at Lindsay, and told them both that by now the petition would be on file with the Secretary of Agriculture, and if they had fruit to ship in excess of their allotment they could begin the next day to make such shipments and could continue unless and until they received an injunction or restraining order stopping them" (R. 183). Mr. Weikert further testified that he has always proceeded on the assumption that an administrative petition was filed with the Secretary the day after he sent it by air mail to Washington, and that this is the first occasion on which any question has been raised with respect to the filing date (R. 184).

The administrative hearing pursuant to the petition filed under § 8c(15)(A) of the Act was held on June 14, 1956 (R. 174), and Mr. Woodall testified that he does not remember whether he saw or communicated with Mr. Weikert during the period from the filing of the administrative petition to the hearing (R. 174–176). The decision on the administrative petition was adverse to the defendants, and no appeal was taken from the administrative decision (R. 28, 88, 331–348).

JUDGMENT OF THE DISTRICT COURT

The District Court entered judgment in favor of the defendants on the ground that the shipments by Lo Bue Brothers in excess of its allotments were not "willful" (R. 91). The Court referred, in its memorandum decision, to three prior decisions in which a District Court held that the proper filing of an administrative petition under § 8c(15)(A) of the Act

exempts the handler from the civil penalty provisions under § 8a(5) of the Act in addition to the provisions for a fine of $50 to $500 under § 8c(14) of the Act, even though the exemption appears only in § 8c(14) of the Act, but the Court in the case at bar concluded that it is unnecessary to resolve that issue inasmuch as it was concluded, in this case, that the excess shipments were not "willful" (R. 65–72). Specifically, the Court concluded that the excess shipments were not willful because the defendants relied on the advice of Mr. Weikert (1) that the filing of a petition under § 8c(15)(A) of the Act would exempt them from civil liability as well as from a fine under § 8c (14) of the Act and (2) that the administrative petition mailed in Los Angeles on April 5, air mail, registered, "would be on file with the Secretary of Agriculture" on April 6, and that they could begin the next day to make shipments in excess of their allotments (R. 183, 71–72) even though it was found by the District Court that the petition "was not filed in the office of the Secretary of Agriculture, Washington, D.C. until in the afternoon of April 9, 1956" (R. 87).

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in finding and concluding that the defendents', *i.e.,* appellees', shipments of navel oranges in excess of the relevant quotas or allotments under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*) were not "willful" within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

2. The shipments of navel oranges by the defendants in excess of the relevant quotas or allotments pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*) were not accidental, involuntary, or unintentional—that is to say, the defendants knowingly and intentionally made the excess shipments of navel oranges involved in this case—and accordingly the District Court erred in finding and concluding that the excess shipments of navel oranges by the defendants were not "willfully" made within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

3. The petition filed by the defendants under § 8c (15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 608c(15)(A)) was not filed in the United States Department of Agriculture until after the defendants' shipments of navel oranges in excess of the relevant quotas or allotments pursuant to the Act, and accordingly the District Court erred in finding and concluding that the excess shipments of navel oranges, involved in this suit, by the defendants were not "willfully" made within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

4. The defendants relied on an erroneous opinion to the effect that their petition under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 608c(15)(A)) had been filed in the United States Department of Agriculture, and accordingly the District Court erred in finding and concluding that because the defendants relied on such opinion—and subsequently shipped navel oranges in

excess of the relevant quotas or allotments under the Act—the defendants' shipments of navel oranges in excess of the relevant quotas or allotments under the Act were not "willful" within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

5. The defendants did not file and prosecute their petition under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 608c(15)(A)) in good faith and not for delay, and accordingly the District Court erred in finding and concluding that the excess shipments of navel oranges, involved in this suit, by the defendants were not "willfully" made within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

6. The filing of a petition under § 8c(15)(A) of the Act (7 U.S.C. 1952 ed. § 608c(15)(A))—either before or after the shipments of navel oranges by the defendants in excess of the relevant quotas or allotments under the Agricultural Marketing Agreement Act of 1937—does not, as a matter of law, exempt the defendants from liability under the provisions of § 8a (5) of the Act (7 U.S.C. 1952 ed. § 608a(5)) in this case, and accordingly the District Court erred in finding and concluding that, because the defendants relied on legal advice to the effect that the filing of a petition under § 8c(15)(A), if filed in good faith, would exempt them from such liability, the shipments of navel oranges in excess of the relevant quotas or allotments under the Act were not "willfully" made within the meaning of § 8a(5) of the Act.

7. The defendants relied on erroneous legal advice in making their shipments of navel oranges in excess

of the relevant quotas or allotments under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*), and accordingly the District Court erred in finding and concluding that because the defendants relied in good faith on such legal advice, the defendants' excess shipments of navel oranges were not "willfully" made so as to subject the defendants to liability pursuant to § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

8. The District Court erred in finding and concluding that—in view of its findings and conclusion that the defendants accepted, believed, and relied in good faith on the advice given to them by a reputable attorney to the effect that the filing of a petition, in good faith, by the defendants pursuant to § 8c(15)(A) of the Act (7 U.S.C. 1952 ed. § 608c (15)(A)) would, as a matter of law, exempt the defendants from liability for penalties under the Act with respect to shipments during the period from the filing of such petition to the decision thereon by the administrative agency, unless shipments were enjoined by a District Court, and that the defendants accepted, believed, and relied in good faith on such advice given to them by the attorney and filed or undertook to file such a petition under § 8c(15)(A) of the Act—the defendants' shipments of navel oranges in excess of the relevant quotas or allotments under the Act were not "willful" within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)).

9. The findings and conclusion by the District Court that the shipments of navel oranges by the defendants in excess of the relevant quotas or allotments pursuant

to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*) were not "willfully" made within the meaning of § 8a(5) of the Act are, on the basis of the record in the case, clearly erroneous.

10. The findings and conclusion by the District Court that the defendants accepted and believed the advice of a reputable attorney and acted in good faith in reliance thereon in making the shipments of navel oranges in excess of the relevant quotas or allotments pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*) and in so doing exercised ordinary and reasonable care and caution and did not knowingly, intentionally, or willfully exceed the relevant quotas or allotments are, on the basis of the record in the case, clearly erroneous.

11. The District Court erred in failing to find, conclude, and enter judgment to the effect that the shipments of navel oranges by the defendants in excess of the relevant quotas or allotments pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*) were "willfully" made within the meaning of § 8a(5) of the Act (7 U.S.C. 1952 ed. § 608a(5)), and that the defendants are liable under the terms of § 8a(5) of the Act.

SUMMARY OF ARGUMENT

The defendants, *i.e.*, appellees, shipped navel oranges in excess of their marketing quotas established pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1952 ed. § 601 *et seq.*), and the defendants knew that the shipments were in excess

of their quotas. This action was filed to recover civil penalties pursuant to § 8a(5) of the Act which provides that "[a]ny person willfully exceeding any quota or allotment fixed for him * * * [under the Act], and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States" (7 U.S.C. 1952 ed. § 608a(5)).

The District Court was of the opinion that the defendants did not "willfully" exceed their quotas because the defendants relied on the advice of an attorney with respect to the filing of a petition, under § 8c(15)(A) of the Act, for administrative review of the quotas (R. 71–72, 89–91, 182). The attorney advised the defendants that "the statute provides that where a (15)(A) petition [*i.e.*, a petition filed pursuant to 7 U.S.C. 1952 ed. § 608c(15)(A)] is filed in good faith the order or allotment complained of is in effect suspended until there is a decision on the petition, and that the petitioner is exempted from penalties prescribed by the Act" (R. 182). The only provision in the Act with respect to an exemption from liability if a petition is properly filed under § 8c(15)(A) is set forth in a proviso in § 8c(14) relative to liability for a fine of $50 to $500 for each shipment in excess of a quota (7 U.S.C. 1952 ed. § 608c(14)). But § 8c(14), relied on by the defendants in the District Court (R. 64–65), provides an exemption only "under this subsection," *i.e.*, § 8c(14), if a petition for ad-

ministrative review is "filed and prosecuted by the defendant in good faith and not for delay" (7 U.S.C. 1952 ed. § 608c(14)).

A. The advice of the defendants' attorney, with respect to the applicancy of the proviso in § 8c(14) of the Act to a suit for civil penalties under § 8a(5), is erroneous, and reliance on erroneous advice of counsel is not a defense to an action for civil penalties under § 8a(5) of the Act. The provisions for triple forfeiture in § 8a(5) contain no reference to, or qualification by, § 8c(14) or § 8c(15)(A). The proviso in § 8c(14) is expressly delimited to an exception with respect to liability for a fine of $50 to $500 imposed "under this subsection," *i.e.,* under subsection (14) of § 8c of the Act.[9] In the original draft of the bill, H.R. 8492, 74th Cong., 1st Sess., p. 22, which subsequently was enacted and which included § 8c(14) of the Act, the exception related to convictions "under this title" but the proviso as passed by Congress relates only to an exception with respect to fines imposed "under this subsection." The entire subsection as enacted by Congress, *viz.,* subsection (14) of § 8c, consists of a single sentence in which the terms "section"—*i.e.,* § 8c of the Act—and "subsection" are both used. This emphasizes that the proviso in § 8c(14)—*i.e.,* relating to an exception with respect to fines imposed under "this subsection"—means just what it says, and there is no basis for construing the excep-

[9] It is made plain in the Act of August 24, 1935, which enacted § 8c(14), that the "section" is § 8c and the "subsection" is (14). 49 Stat. 750, 753. See also, 48 Stat. 31, 34–35, 670, 672; 50 Stat. 246.

tion imposed under subsection (14) of § 8c of the Act as being applicable, in addition, to a different penalty imposed by a subsection of another section of the Act, *i.e.,* § 8a(5).

When a provision is carefully included in one place in an Act and omitted in another place it should not be implied at the place where it is omitted. *United States* v. *Atchison, T. & S.F. Ry. Co.,* 220 U.S. 37, 44; *Corn Products Refining Co.* v. *Benson,* 232 F. 2d 554, 562 (C.A. 2). Where the provisions of two statutory sections are so unlike each other that the comparison exhibits only a contrast, instead of saying that the different sections were designed to be similar "it would seem much more reasonable to say that the one * * * [section] exhibits a legislative mind materially variant in the particulars where the difference exists, from what is exhibited by the other." *Pennington* v. *Coxe,* 2 Cranch 33, 58–59. See also, *United States* v. *Cooper Corp.,* 312 U.S. 600, 605.

These sections of the Act were enacted by Congress at different times. The statutory provision for triple forfeiture, *i.e.,* § 8a(5), was enacted as a part of the Jones-Costigan Act of 1934 (48 Stat. 670, 674–675), and at that time the statute contained no § 8c (14), § 8c(15)(A), or similar provisions. Hence, it cannot be said that at the time of the enactment of § 8a(5) it should have been read as if it contained a proviso for exemption from liability if a petition under § 8c(15)(A) is filed and prosecuted in good faith. In addition "willfully" in § 8a(5) could not, at the time of the enactment of the provision for triple forfeiture, have had implicit in it the meaning

that a petition filed and prosecuted in good faith under § 8c(15)(A)—which had not been enacted—would effectuate an exemption from liability for triple forfeiture.

At the time of the enactment of §§ 8c(14) and 8c (15)(A) in the Act of August 24, 1935, the Congress made effective many amendments relating to sentences, clauses, exceptions, provisos, and words in the antecedent legislation. The mere reading, *in extenso,* of these carefully drafted amendments will show that careful and minute attention was given to all of the prior legislative provisions in the drafting of the amendments in the Act of August 24, 1935 (49 Stat. 750), and the enactment of these amendments by Congress. Significantly, there is no amendment to §8a (5) providing for triple forfeiture. If Congress had intended for the triple forfeiture section, § 8a(5), to be subject to the same proviso as is set forth in the statutory section for a fine of $50 to $500, § 8c(14), for each shipment of fruit in excess of a quota, Congress would have said so.

All statutory factors and the legislative history of the various statutory sections plainly show that § 8a (5) of the Act, providing for triple forfeiture, is not to be read so as to contain the exception in § 8c(14). A statute, even a criminal statute, is not to be read "so as to put in what is not readily found there." *United States* v. *Hood,* 343 U.S. 148, 151.

Other factors also warrant the reading of the statute so as to give effect to § 8a(5) without interpolating into § 8a(5) the proviso in § 8c(14), and thereby

devitalizing the enforcement provisions in § 8a(5) of the Act. The statute is remedial legislation, and remedial language should be given "hospitable scope" (see, *e.g., Black* v. *Magnolia Liquor Co.,* 355 U.S. 24, 26). A regulatory statute should be interpreted so that its effectiveness will not be impaired, and if possible an interpretation should be adopted which "will preserve the vitality of the Act and the utility of the language * * *." *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381, 392. "Remedial statutes should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F. 2d 253, 258 (C.A. 4), certiorari denied, 339 U.S. 919. Shipments of fruit in excess of a marketing quota strike at the heart of the program. 18 F.R. 4710. Shipments of fruit in excess of a marketing quota, as in this case, constitute disorderly marketing which this regulatory program is designed to prevent. *Ibid.*

B. The so-called "finding" by the District Court (R. 90–91) that the defendants did not "willfully" ship fruit in excess of their quotas is a conclusional or ultimate finding, and under numerous decisions it is well established that an appellate court is free to formulate its independent judgment where, as here, the finding is an ultimate finding, involves a conclusion of law, is induced by an error of law, is a determination of a mixed question of fact and law, and is based on a stipulation of facts and undisputed evidence.

The defendants "willfully" exceeded their quotas within the meaning of § 8a(5) of the Act irrespective of whether they had an evil motive or knew that their shipments were illegal. The meaning of the word "willful" is often influenced by its context. *Spies* v. *United States,* 317 U.S. 492, 497. In numerous cases, involving regulatory statutes, it has been held that an intentional or deliberate act constitutes a "willful" violation even though there is no proof of evil motive or that the defendant knew that his conduct was unlawful. *E.g.,* in *United States* v. *Gris,* 247 F. 2d 860, 864 (C.A. 2), it was said that "[i]t matters not whether appellant realized his conduct was unlawful. He knew exactly what he was doing; and what he did was a violation of the Federal Communications Act. He intended to do what he did, and that is sufficient" to sustain the conclusion that he "willfully and knowingly" intercepted and divulged telephone communications in violation of the statute. Some of the other cases which are apposite here are *Trenton Chemical Co.* v. *United States,* 201 F. 2d 776, 777–780 (C.A. 6), certiorari denied, 345 U.S. 994; *Fields* v. *United States,* 164 F. 2d 97, 99–101 (C.A.D.C.), certiorari denied, 332 U.S. 851; *Dennis* v. *United States,* 171 F. 2d 986, 990–991 (C.A.D.C.), affirmed on other grounds, 339 U.S. 162; *Chicago, St. P.M. & O. Ry. Co.* v. *United States,* 162 Fed. 835, 840–842 (C.A. 8), certiorari denied, 212 U.S. 579. It has also been held that the word willful, "even in criminal statutes, means no more than the person charged with the duty knows what he is doing. It

does not mean that, in addition, he must suppose that he is breaking the law." *American Surety Co.* v. *Sullivan,* 7 F. 2d 605, 606 (C.A. 2).

The decisional law supports our interpretation of the word "willful" as it is used in remedial legislation, such as that in the case at bar.

C. Assuming, *arguendo,* that the filing of an administrative petition under § 8c(15)(A) of the Act "in good faith and not for delay" or that reliance in good faith on erroneous advice is a bar to an action for civil penalties under § 8a(5) of the Act, nonetheless the undisputed facts show that the defendants willfully shipped oranges in excess of their allotments and are liable for civil penalties under § 8a(5).

The intention was deliberate on the part of the defendants to make the shipments of fruit in excess of their quotas, and the petition under § 8c(15)(A) of the Act was filed solely as a maneuver to enable them to make the shipments. After the shipments were made the defendants manifested no interest with respect to the outcome of the adjudicatory proceeding on their petition pursuant to § 8c(15)(A). The decision on the administrative petition was adverse to the defendants (R. 88, 331–348), and although the proceeding was not moot, as a matter of law, no appeal was taken from the adverse administrative decision (R. 28).

The exemption, relied on by the defendants, in § 8c (14) of the Act is applicable only to such violations "as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling

thereon was given to the defendant * * *." 7 U.S.C. 1952 ed. § 608c(14). A petition for administrative review pursuant to § 8c(15)(A) is "deemed to be filed when it is received by the [H]earing [C]lerk" in the Department in Washington, D.C. 7 CFR § 900.69(d). But admittedly, as found by the District Court, the defendants' petition was not "filed," *i.e.,* "received," in the office of the Hearing Clerk in the Department in Washington, D.C. "until in the afternoon of [Monday] April 9, 1956" (R. 87). The excess shipments, however, were made on April 7 and 8 (R. 24, 33–34, 83–84).

The defendants knew that the petition was not mailed in Los Angeles until Thursday, April 5 (R. 123, 186). The defendants knew that the statutory interpretation on which they were relying is applicable only after the petition has been "filed" (R. 160, 182–186). But the defendants made no effort, by telephone or otherwise, to ascertain whether the petition was "filed" on Friday, April 6. Instead the defendants proceeded on the statement of their attorney on April 6 that "by now the petition would be" on file (R. 183). The filing of the petition is the vital factor in the defendants' theory of statutory interpretation, but in this vital respect there was no effort by the defendants to ascertain whether the petition had been filed. The excess shipments were made on April 7 and 8, although the petition was not filed until April 9. These circumstances in conjunction with other factual circumstances, which cannot be fully outlined within the compass of this summary, support the view that

the filing of the petition was merely a maneuver or stratagem on the part of the defendants.

The stipulation of facts and the undisputed evidence warrant the conclusion that the petition under § 8c(15)(A) was not filed "in good faith and not for delay," and that the defendants did not rely, in good faith, on the advice which they received. In brief, the record shows that the defendants willfully shipped navel oranges in excess of their marketing quotas, and are liable for the civil penalties imposed by § 8a(5) of the Act.

ARGUMENT

The defendants intentionally shipped navel oranges in excess of their marketing quotas, and the shipments, willfully made, subject the defendants to liability for civil penalties pursuant to § 8a(5) of the Act

The defendants, *i.e.,* the appellees, admittedly shipped navel oranges on April 7 and 8, 1956, in excess of their marketing quotas and, admittedly, the defendants knew that the shipments were in excess of their quotas (R. 24, 33–34, 83–91, 99, 154, 159–160). Hence the defendants are liable for civil penalties under § 8a(5) of the Act unless the violations were not "willful" within the meaning of the statutory language. The arguments in the case converge on the statutory provision that "[a]ny person willfully exceeding any quota or allotment fixed for him * * * [under the Act], and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a

civil suit brought in the name of the United States." 7 U.S.C. 1952 ed. § 608a(5).[10]

The District Court was of the opinion that the shipments of fruit, in excess of the marketing quotas, were not "willful" because the defendants relied on the advice of an attorney with respect to the filing of a petition, under § 8c(15)(A) of the Act, for administrative review of the quotas (R. 71–72, 89–91, 182). The advice thus referred to by the District Court relates (1) to the time of the filing of the petition for administrative review under § 8c(15)(A), and (2) to the effect—pursuant to the statutory provisions—of such filing.

A petition for administrative review under § 8c(15)(A) of the Act is "deemed to be filed when it is received by the hearing clerk." 7 CFR § 900.69(d). The District Court found (R. 87), based on the undisputed evidence (R. 28, 35–44), that the petition was not filed in the Office of the Hearing Clerk, in the United States Department of Agriculture, until April 9. The defendants' excess shipments of fruit

[10] The penalty provisions involved in this case are similar to the provisions for a forfeiture of a "sum equal to three times the market value" of sugar involved in a violation of the Sugar Act of 1948. 7 U.S.C. 1952 ed. Supp. V § 1155(a). See also, the provisions for double damages in 31 U.S.C. 1952 ed. § 231; 40 U.S.C. 1952 ed. § 489(b)(1); 31 U.S.C. 1952 ed. § 443; 31 U.S.C. 1952 ed. § 316a; 46 U.S.C. 1952 ed. § 1356; and for triple forfeiture in 49 U.S.C. 1952 ed. § 41(3). Where, as in the case at bar, a money judgment is sought the Federal Rules of Civil Procedure are applicable even though the word "forfeit" or "forfeiture" is used in the statute. See, *e.g.*, *United States* v. *Stangland*, 242 F. 2d 843, 846 (C.A. 7); *Miller* v. *United States*, 242 F. 2d 392, 393–395 (C.A. 6), certiorari denied, 355 U.S. 833.

were on April 7 and 8 (R. 24, 33–34, 83–84), but the defendants' attorney stated to them that the petition "would be on file" by April 6 (R. 183).[11]

With respect to the effect of the filing of a petition under § 8c(15)(A) of the Act, the defendants relied in the District Court (R. 64–65) on the proviso in § 8c(14) of the Act which provides an exception from liability "under this subsection," *i.e.*, § 8c(14), from a fine of $50 to $500 for each shipment in excess of a quota, if a petition for administrative review pursuant to § 8c(15)(A) of the Act is "filed and prosecuted by the defendant in good faith and not for delay" (7 U.S.C. 1952 ed. § 608c(14)). The District Court failed to resolve the issue as to whether the defendants' attorney, in giving advice to the defendants relative to the shipment of oranges in excess of their quotas, properly interpreted the proviso in § 8c(14) as being applicable to the civil penalties pursuant to § 8a(5) of the Act.

We shall show that (1) the advice of the defendants' attorney as to the interpretation of the proviso in § 8c(14) of the Act is erroneous, and (2) reliance on erroneous advice of counsel is no defense to an

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[11] Assuming, *arguendo*, that our construction of the Act with respect to the effect of the filing of a petition under § 8c(15)-(A) of the Act is erroneous, nonetheless the excess shipments occurred prior to the filing of the petition for administrative review, and the statutory exception referred to by the defendants' counsel, in giving his advice to the defendants, relates only to "such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant * * *" (7 U.S.C. 1952 ed. § 608c(14)). See, *infra*, pp. 63–68.

action for civil penalties under § 8a(5) of the Act. Assuming, *arguendo,* the relevancy of the proviso in § 8c(14), we shall show that in any event the defendants did not file the petition for administrative review "in good faith and not for delay," as required by the proviso in § 8c(14) of the Act, and that the defendants failed to take necessary steps to insure that their excess shipments were made subsequent to the filing of the petition under § 8c(15)(A). The defendants intentionally shipped navel oranges in excess of their marketing quotas, and the shipments, willfully made, subject the defendants to liability for triple forfeiture pursuant to § 8a(5).

A. The proviso in § 8c(14) of the Act—relating to an exemption, from a fine of $50 to $500 imposed by § 8c(14), if a petition for administrative review is properly filed under § 8c(15)(A)—is not applicable in a suit for civil penalties, under § 8a(5) of the Act, for shipments of fruit in excess of a quota. The contrary advice by the defendants' attorney is erroneous

1. The statutory language and its legislative history plainly show that the proviso or exception in § 8c(14) is not applicable to § 8a(5) with respect to a suit for triple forfeiture

The basis for the complaint in this case is the statutory provision in § 8a(5) of the Act imposing triple forfeiture with respect to the willful shipment of fruit in excess of a marketing quota (7 U.S.C. 1952 ed. § 608a(5)). There is no exemption or exception in § 8a(5) of the Act. Nothing is said in the statute with respect to an exemption or exception from the liability for triple forfeiture, under § 8a(5), if a petition for administrative review is filed under § 8c (15)(A) of the Act. The defendants relied, however, in the District Court (R. 64–65) on the proviso in § 8c(14) of the Act. A fine of $50 to $500 is provided for by § 8c(14), and the proviso states that

"if the court finds that a petition pursuant to subsection (15) of this section [*i.e.,* § 8c(15) of the Act] was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed *under this subsection* [emphasis supplied] for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant * * *" (7 U.S.C. 1952 ed. § 608c(14)).

The proviso in § 8c(14) of the Act is expressly limited to an exception with respect to a fine of $50 to $500 imposed "under this subsection," *i.e.,* under subsection (14) of § 8c of the Act. In the original draft of the bill, H.R. 8492, 74th Cong., 1st Sess., p. 22, which subsequently was enacted and which included § 8c(14) of the Act, the exception related to convictions "under this title,"[12] but the proviso, as passed by Congress, relates specifically to an exception as to fines imposed "under this subsection."[13] The

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[12] Similarly, earlier bills relating to the subject matter which is now contained in the proviso in § 8c(14) of the Act provided that the exception is applicable to convictions "under this title." See, H.R. 5585, 74th Cong., 1st Sess., p. 4; H.R. 8052, 74th Cong., 1st Sess., p. 8; S. 1807, 74th Cong., 1st Sess., p. 5.

[13] It is plainly stated in the Act of August 24, 1935, enacting, *inter alia,* § 8c(14), that the "section" is § 8c and the subsection is (14). 49 Stat. 750, 753. Also the Jones-Costigan Act of 1934, enacting, *inter alia,* § 8a(5), states that the "section" is § 8a, and thus the subsection is (5). 48 Stat. 670, 672. Again in the enactment of the Agricultural Marketing Agreement Act of 1937 the Congress identifies the "section" as § 8c. 50 Stat. 246. Also the proviso in § 8c(14), relied on by the defendants, refers to "subsection (15)" of this section, *i.e.,* § 8c(15). 7 U.S.C. 1952 ed. § 608c(14).

entire subsection, as enacted by Congress, *viz,* subsection (14) of § 8c, consists of a single sentence in which the terms "section"—*i.e.,* § 8c of the Act (7 U.S.C. 1952 ed. § 608c(1)–(19))—and "subsection" are both used.[14] This emphasizes the view that the proviso in § 8c(14)—*i.e.,* relating to an exception with respect to fines imposed "under this subsection"—means just what it says. The collocation of terms is significant of the legislative intent. See, *e.g., Crawford* v. *Burke,* 195 U.S. 176, 190; *Federal Land Bank of Springfield* v. *Hansen,* 113 F. 2d 82, 84 (C.A. 2). The use of the terms "section" and "subsection" in the same sentence of the Act was manifestly deliberate, and there is no basis for construing an exception applicable to fines imposed under subsection (14) of § 8c of the Act as being applicable, in addition, to a different penalty imposed under a different subsection of another section of the Act, *i.e.,* § 8a(5).

The provisions of §§ 8a(5) and 8c(14) of the Act plainly provide for different fines or penalties, and it

[14] The term "section" is used three times and the term "subsection" is also used three times in § 8c(14) of the Act as set forth in the United States Code, but the term "section" appears only twice in § 8c(14) as set forth in the United States Statutes at Large. Subsection (14) of § 8c of the Act as set forth in the United States Code is *verbatim ac litteratim* the same as the provisions in the United States Statutes at Large (49 Stat. 750, 759) except that the last three words which appear in § 8c(14) of the Code, *viz.*, "of this section," do not appear in the Statutes at Large. The text of the Act in the Statutes at Large is, of course, controlling (1 U.S.C. 1952 ed. § 204(a); *Stephan* v. *United States*, 319 U.S. 423, 426; *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 379–380), but the difference is immaterial inasmuch as the terms "section" and "subsection" are carefully used in § 8c(14) as set forth in the United States Code and in the Statutes at Large.

is expressly provided in § 8a of the Act that the "remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere" in the Act (7 U.S.C. 1952 ed. § 608a(8)).

When a provision is carefully included in one section of a statute and omitted in another section, it should not be implied in the place at which it is omitted. *United States* v. *Atchison, T. & S.F. Ry. Co.,* 220 U.S. 37, 44; *Lang* v. *Commissioner,* 289 U.S. 109, 112; *Corn Products Refining Co.* v. *Benson,* 232 F. 2d 554, 562 (C.A. 2); *Hamilton* v. *National Labor Rel. Board,* 160 F. 2d 465, 470 (C.A. 6), certiorari denied, *sub nom. Kalamazoo Stationery Co.* v. *National Labor Rel. Board,* 332 U.S. 762. Here, as in *Iselin* v. *United States,* 270 U.S. 245, 250–251, the "statute was evidently drawn with care," and to interpolate in § 8a(5) of the Act the proviso in § 8c(14) "is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted * * * may be included within its scope." But to "supply omissions [in a statute] transcends the judicial function." *Ibid.*

Although the filing of a petition pursuant to § 8c (15)(A) is of significance with respect to the avoiding of a fine under § 8c(14) of the Act, no such exception is provided for with respect to the civil penalties, sought in this case, under § 8a(5) of the Act.[15] It has

[15] The burden rests on a person—the defendants in this case—asserting or relying on an exception to demonstrate that the facts are within the strictly construed terms of the exception. *Schlemmer* v. *Buffalo, Rochester, &c. Ry.,* 205 U.S. 1, 10;

been said, in circumstances similar to this, that the "fact of a single exception suggests that no other qualification of the absolute prohibition was intended." *Richfield Oil Corp.* v. *State Board,* 329 U.S. 69, 76. A matter not covered by a statutory exception is subject to the rule prevailing in the absence of the exception. *Moore Ice Cream Co.* v. *Rose,* 289 U.S. 373, 377; *Bend* v. *Hoyt,* 13 Pet. 263, 273. Where no additional exception is made, none is intended (*Cunard S.S. Co.* v. *Mellon,* 262 U.S. 100, 128), and exceptions made in detail "preclude their enlargement by implication" (*Addison* v. *Holly Hill Co.,* 322 U.S. 607, 617). See also, *Brooks* v. *St. Louis-San Francisco Ry Co.,* 180 F. 2d 185, 187 (C.A. 8), certiorari denied, 339 U.S. 966. It is familiar doctrine that the judicial function is to "apply statutes on the basis of what Congress has written, not what Congress might have written." *United States* v. *Great Northern R. Co.,* 343 U.S. 562, 575.

The provisions for triple forfeiture in § 8a(5) of the Act contain no reference to, or qualification by, §§ 8c(14) or 8c(15)(A). Here, as in *Thornley* v. *United States,* 113 U.S. 310, 315, we are not called on to explain why Congress should apply one rule to one statutory section and another rule to another

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Spokane & Inland R.R. v. *United States*, 241 U.S. 344, 350; *United States* v. *Morrow*, 266 U.S. 531, 534–536; *Piedmont & Northern Ry.* v. *Comm'n*, 286 U.S. 299, 311–312; *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Com'n.*, 106 F. 2d 667, 674 (C.A. 3), certiorari denied, 308 U.S. 625; *Detroit Edison Co.* v. *Securities & Exchange Commission*, 119 F. 2d 730, 739 (C.A. 6), certiorari denied, 314 U.S. 618; *Shilkret* v. *Musicraft Records*, 131 F. 2d 929, 931 (C.A. 2), certiorari denied, 319 U.S. 742.

statutory section. "It is sufficient to say that it has clearly done so." *Ibid.* If the law is deemed to be unequal in variant respects, "the remedy is with Congress and not with the courts." *Ibid.* When, as here, the statutory terms are plain it is not for the courts to "speculate on probabilities of intention." *Bruner* v. *United States,* 343 U.S. 112, 116; *Insurance Co.* v. *Ritchie,* 5 Wall. 541, 544–545. Similarly, in *United States* v. *Cooper Corp.,* 312 U.S. 600, 605, it was held that it is not the judicial function "to engraft on a statute additions which we think the legislature logically might or should have made." It is not for the courts to beat down distinctions in a statute. *Pennington* v. *Coxe,* 2 Cranch 33, 58–59. "It is the duty of the court, to discover the intention of the legislature, and to respect that intention." *Ibid.* Where the provisions of two statutory sections are so unlike each other that the comparison exhibits only a contrast, instead of saying that these different sections were designed to be similar "it would seem much more reasonable to say, that the one * * * [section] exhibits a legislative mind materially variant in the particulars where the difference exists, from what is exhibited by the other." *Ibid.*

Additional support for our interpretation of the Act is found (1) in the origin of the statutory section for triple forfeiture, *i.e.,* § 8a(5), and (2) in the origin of the enactment by Congress of the administrative review provisions in § 8c(15)(A) and the statutory provisions for a fine of $50 to $500 in § 8c(14). The statutory provision for triple forfeiture, *i.e.,* § 8a(5), was enacted as a part of the

Jones-Costigan Act of 1934 (48 Stat. 670, 674–675), as an amendment to the Agricultural Adjustment Act of 1933 (48 Stat. 31).[16] At the time of the enactment of the Jones-Costigan Act of 1934 providing for triple forfeiture, the legislation contained no §§ 8c(14), 8c(15)(A), or similar provisions. It was not until the Act of August 24, 1935 (49 Stat. 750, 759–760), that § 8c(15)(A), relating to administrative review, was enacted by Congress. It was also in the Act of August 24, 1935, that a fine of $50 to $500 was provided for, in § 8c(14), and at that time the statutory subsection providing for a fine also included the proviso for an exemption from liability for a fine *under that subsection* if a petition under § 8c(15)(A) is filed and prosecuted in good faith and not for delay. The Act of August 24, 1935, is also an amendment to the Agricultural Adjustment Act of 1933. Hence it cannot be said that at the time of the enactment of these statutory provisions, the section for triple forfeiture, § 8a(5), should be read as if it contained a proviso for exemption from liability if a petition under § 8c(15)(A) is filed and prosecuted in good faith. No such statutory provision as § 8c(15)(A) was in existence at the time of the enactment of the section for triple forfeiture, § 8a(5), and plainly there could have been no ground for reading in such an interpolation. In addition, the word "willfully" in the triple forfeiture section could not, at the time of the enactment of the sec-

[16] See, *supra*, fn. 2, pp. 2–3, for a summary with respect to the genesis of the various statutory provisions in the Agricultural Marketing Agreement Act of 1937.

tion, have had implicit in it the meaning that a petition filed and prosecuted in good faith under § 8c(15)(A)—which was then nonexistent—would effectuate an exemption from liability for triple forfeiture under § 8a(5). Certainly, the term "willfully" could have had no such hidden or latescent meaning at the time of the enactment of the section for triple forfeiture.

There is "no better key" to statutory construction "than the law from which the challenged statute emerged." *United States* v. *C.I.O.,* 335 U.S. 106, 112–113. See also, *Hamilton* v. *Rathbone,* 175 U.S. 414, 419–421; *United States* v. *Union Pac. R.R. Co.,* 91 U.S. 72, 89. A provision of an act "must take meaning from its historical setting." *United States* v. *Henning,* 344 U.S. 66, 72. The statutory section for triple forfeiture, § 8a(5), contained no qualification or exception at the time of its enactment by Congress, and it cannot be gainsaid that the provision for triple forfeiture could not have contained a qualification or exception with respect to the filing of a petition under a statutory section, *viz,* § 8c(15)(A), which was then nonexistent.

There are additional tokens of congressional intention, tokens still within the statutory provisions and all pointing the same way. The Act of August 24, 1935, effectuates many amendments to the Agricultural Adjustment Act of 1933, as amended by the Jones-Costigan Act of 1934. Many of the amendments in the Act of August 24, 1935, relate to sentences, clauses, exceptions, provisos, and words in the antecedent legislation. See *e.g.,* §§ 3–4, 7–11, 14–15,

17, 19–20, 22–24, 26, 29, 35, and 36 in the Act of August 24, 1935 (49 Stat. 750, 753–775). Moreover, §§ 8–10 in the Act of August 24, 1935 (49 Stat. 750, 762), are amendatory of various provisions in § 8a of the Agricultural Adjustment Act, which section, *viz.,* 8a, including § 8a(5) at issue in this case, was added by the Jones-Costigan Act of 1934, as we have shown, *supra,* pp. 38–39. Specifically, § 9 of the Act of August 24, 1935 (49 Stat. 750, 762), amends subsection 8a(6) of the Agricultural Adjustment Act, which is the subsection immediately following the subsection at issue in this case. The mere reading, *in extenso,* of those carefully drafted amendments compels the conclusion that careful and minute attention was given to all of the prior legislative provisions in the drafting of the amendments in the Act of August 24, 1935, and the enactment of those amendments by Congress. Significantly, there is no amendment to § 8a(5) providing for triple forfeiture, even though the Act of August 24, 1935, enacts § 8c(15)(A) and the statutory section for a fine of $50 to $500, *i.e.,* § 8c(14). Although the Congress carefully provided in the Act of August 24, 1935, that the filing of a petition under § 8c(15)(A), if filed and prosecuted in good faith and not for delay, would exempt a person from a fine under § 8c(14), it is notable that Congress did not provide for an exception with respect to the liability for triple forfeiture. If Congress had intended for the triple forfeiture section to be subject to the same proviso as is set forth in the statutory section for a fine of $50 to $500, for each shipment of fruit in excess of a quota, Congress would have said

so. It is going very far indeed to argue a sameness of Congressional intention from these dissimilar statutory provisions. The differences cannot be disregarded, and the differences are plainly indicative of a difference of Congressional intent.

In short, all statutory factors and the legislative history of the various sections in the Act plainly show that § 8a(5) of the Act, providing for triple forfeiture, is not to be read so as to contain the exception in § 8c(14).[17] A statute, even a criminal statute, is not to be read "so as to put in what is not readily found there." *United States* v. *Hood*, 343 U.S. 148, 151. The courts, in the interpretation of an Act, are "neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam* v. *United States,* 340 U.S. 593, 596. The Congress has plainly made a distinction, in this respect, between §§ 8a(5) and 8c(14) of the Act, and the variant provisions should be applied as written.[18]

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[17] The District Court referred (R. 65–66) to three unreported decisions of the United States District Court for the Southern District of California in which it was held that the exception in § 8c(14) is applicable also to § 8a(5). It cannot, however, be said that those unreported decisions—two of the cases were companion cases—are of significance here. It has been held that even a decision of a Court of Appeals "construing an act does not approach the dignity of a well settled interpretation." *United States* v. *Raynor*, 302 U.S. 540, 552.

[18] It was held in *Scott* v. *Reid*, 10 Pet. 524, 527, that "where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. * * * [I]t is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they

If one goes beyond the plain meaning that the Act spontaneously yields and beyond the legislative history, other factors also warrant the reading of the statute so as to give effect to § 8a(5) without interpolating into that section the proviso in § 8c(14).

2. The statutory provision for enforcement actions under § 8a(5), for triple forfeiture, should be interpreted so as to preserve the vitality of the Act and to discourage violations

The necessary effect of reading into § 8a(5) of the Act, providing for triple forfeiture, the proviso in § 8c(14) is to enfeeble and debilitate the enforcement of this regulatory measure. Compliance by handlers with respect to a quota limitation is essential if the regulatory purpose of the Act is to be attained.[19] Shipments of fruit in excess of a marketing quota, as in this case, strike at the heart of the program.

In the absence of regulation, handlers "ship excessive quantities [of navel oranges] because of [the] desires of producers to pick their fruit and thereby avoid losses through damage or deterioration in the groves. Moreover no individual handler or group of handlers successfully can increase the level of prices by reducing shipments because other handlers can

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were excluded from its provisions. We are unable to say why the benefits of this statute were given" to some persons and "withheld" from others, "but the legislature having made a distinction between the cases; whether it was intentional or not, reasonable or unreasonable; the court[s] are bound by the clearly-expressed language of the act."

[19] It is the declaratory purpose of the Act, *inter alia*, "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices" as defined in the statute. 7 U.S.C. 1952 ed. § 602(1).

nullify such action by increasing their shipments accordingly." [20] 18 F.R. 4710. Marketing quotas are "needed to effectuate the declared policy of the Act

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[20] These findings were made by the Secretary on the basis of the evidence adduced at the public hearing on the proposed Order Regulating the Handling of Navel Oranges Grown in Arizona and a Designated Part of California. The findings carry a presumption of the existence of adequate evidence to support the administrative action. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 567–568. See also, *Niagara Hudson Corp.* v. *Leventritt*, 340 U.S. 336, 340. No issue arises, in this enforcement action, relative to the validity of the findings, the validity of the order, or the validity of the marketing quotas (R. 100–102). A petition under § 8c(15)(A) of the Act, with judicial review available under § 8c(15)(B), is the exclusive method for challenging the validity of an order, a provision of an order, or an obligation imposed in connection therewith. *United States* v. *Ruzicka*, 329 U.S. 287, 292–293; *Panno* v. *United States*, 203 F. 2d 504, 508–509 (C.A. 9); *United States* v. *Turner Dairy Co.*, 166 F. 2d 1, 3–5 (C.A. 7), certiorari denied, 335 U.S. 813; *La Verne Co-op Citrus Ass'n* v. *United States*, 143 F. 2d 415, 418 (C.A. 9); *Benson* v. *Schofield*, 236 F. 2d 719, 722 (C.A. D.C.), certiorari denied, 352 U.S. 976; *United States* v. *Ideal Farms, Inc.*, 262 F. 2d 334, 334–335 (C.A. 3). A handler who has filed a petition under § 8c(15)(A) may, in appropriate circumstances, obtain interim relief by filing, with the Hearing Clerk, an application to the Secretary "for an order postponing the effective date of, or suspending the application of, the marketing order or any provision thereof, or any obligation imposed in connection therewith, pending final determination of the proceeding" under §8c(15)(A). 7 CFR § 900.70. Hence a handler may promptly obtain an administrative review of his contention that an obligation imposed on him is illegal, and judicial review is available. 5 U.S.C. 1952 ed. § 1009(c) and (d); 7 U.S.C. 1952 ed. § 608c(15)(B); 28 U.S.C. 1952 ed. § 1337. In the case at bar, there was no appeal, for judicial review, from the decision of the administrative agency holding that the petition under § 8c(15)(A) is without merit and that the quotas are valid (R. 28, 63–64, 88, 100–102, 331–348).

by establishing orderly marketing conditions for navel oranges * * * through providing a means of limiting the quantity of such oranges that may be shipped each week to commercial fresh channels." *Ibid.*

The susceptibility of perishable agricultural commodities to sharp price fluctuations caused by changes in supply is well recognized. Waite & Trelogan, *Agricultural Market Prices* (2d ed. 1951), pp. 144, 226; Thomsen, *Agricultural Marketing* (1951 ed.), pp. 191–199; Wilcox and Cochrane, *Economics of American Agriculture* (1951 ed.), p. 343; *Marketing, 1954 Yearbook of Agriculture* (United States Department of Agriculture), pp. 338–340; *Agriculture Yearbook 1925* (United States Department of Agriculture), pp. 14, 671. "[T]emporary gluts of a few days' duration may occur in individual terminals so that certain shippers, wholesalers, and retailers will incur considerable losses on particular shipments and purchases." *Marketing, 1954 Yearbook of Agriculture* (United States Department of Agriculture), p. 340. "Maladjustments of market supplies in terminal markets cause erratic price changes which are passed back to producers. The fruit industries, because of the perennial nature of the producing plant and the effect of weather upon supplies in a particular season, experience a most difficult task in tailoring the volume and composition of their available supplies to fit the demands of the consumers." *Id.* at p. 360. In short, the pricing process for agricultural commodities "calls for many delicate adjustments." Thomsen, *Agricultural Marketing* (1951 ed.), p. 82. See also, *The California Fruit Growers Exchange System* (Farm Credit

unstabilized marketing conditions respecting such commerce which have injured and burdened the orange industry, and to defeat the policy of Congress, declared in the act, to promote the orderly exchange of commodities among the several states of the United States and with foreign nations."

If a handler ships in excess of his prorata share, equities are no longer maintained. Other growers and handlers are, in effect, penalized for his actions. While other growers and handlers divert available supplies of navel oranges in excess of the current market requirements so as to create a desired supply and price situation in the fresh market, the violating member of the industry capitalizes on a favorable marketing situation which was created by the joint action of all other industry participants. This inequity, as to complying growers and handlers, is especially severe in the case of navel oranges inasmuch as a large portion of the available supplies in excess of weekly restrictions are diverted to by-products, a far less desirable outlet from the standpoint of price-returns to the grower. For example, the equivalent on-tree returns to growers of California navel oranges from the processing outlet, during the month of April 1956, averaged 6 cents per box as compared to $2.84 per box from the fresh market. *Agricultural Prices-Citrus* (October 1957, Supplement No. 2, Crop Reporting Board, Agricultural Marketing Service, United States Department of Agriculture), p. 8.[22]

[22] Judicial notice may be taken of the official statistics of the Crop Reporting Board in the United States Department of

The penalties provided in the Act are to deter handlers from exceeding their quotas or allotments.[23] The civil penalties imposed in § 8a(5) of the Act are, in the main, substantial, and without this sanction—in its full import, as written in § 8a(5)—effective enforcement is gravely impaired.[24] The statute in this case is remedial legislation and, therefore, its "language should be given hospitable scope." [25] A regulatory statute should be interpreted so that its effectiveness will not be impaired, and if possible an interpretation should be adopted which "will preserve the vitality of the Act and the utility of the language * * *." *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381, 392. See also, *Shapiro* v. *United States,* 335 U.S. 1, 31. Remedial provisions should be liber-

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Agriculture. *Parker* v. *Brown*, 317 U.S. 341, 363; *Colonial Airlines* v. *Janas*, 202 F. 2d 914, 919, fn. 1 (C.A. 2); *United States* v. *Rice*, 176 F. 2d 373, 374, fn. 3 (C.A. 3).

[23] "Congress may impose penalties in aid of the exercise of any of its enumerated powers." *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 393. It is "a now familiar type of legislation whereby penalties serve as effective means of regulation." *United States* v. *Dotterweich*, 320 U.S. 277, 280–281. See also, *Rodgers* v. *United States*, 332 U.S. 371, 374–375; *Helvering* v. *Mitchell*, 303 U.S. 391, 399–400.

[24] A fine of $50 to $500 under § 8c(14) of the Act is manifestly inadequate as the only enforcement measure. Under the decision of the District Court, however, the defendants in subsequent cases may rely on advice of counsel similar to that in this case and thereby escape liability under § 8a(5).

[25] The quotation is from *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 26, in which it was held that the "Court [of Appeals] was constrained to read the [Federal Alcohol Administration] Act narrowly, as it conceived it to be penal in nature when it forfeited a permit to do business. But we deal here with remedial legislation whose language should be given hospitable scope."

ally construed to achieve the congressional purpose. *McDonald* v. *Thompson,* 305 U.S. 263, 266; *Republic Aviation Corporation* v. *Lowe,* 164 F. 2d 18, 20 (C.A. 2), certiorari denied, 333 U.S. 845. "Remedial statutes should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F. 2d 253, 258 (C.A. 4), certiorari denied, 339 U.S. 919. See also, *Piedmont & Northern Ry.* v. *Comm'n,* 286 U.S. 299, 311–312; *Adler* v. *Northern Hotel Co.,* 175 F. 2d 619, 620–621 (C.A. 7).

B. A violation is "willful" under § 8a(5) of the Act if a handler intentionally ships oranges and knows, at the time of shipment, that the shipment is in excess of his quota or allotment. Reliance by the defendants on erroneous advice does not exempt them from liability for civil penalties under § 8a(5) of the Act

The defendants admittedly shipped navel oranges in excess of their quotas and, admittedly, the defendants knew that the shipments were in excess of their quotas (R. 24, 33–34, 83–91, 99, 154, 159–160). It is our purpose to show in this part of our brief that the defendants "willfully" exceeded their quotas within the meaning of § 8a(5) of the Act irrespective of whether they had an evil motive or knew that their shipments were illegal.

Although the District Court found (R. 90–91) that the defendants did not "willfully" ship fruit in excess of their quotas, the so-called "finding" is a conclusional or ultimate finding. An appellate court is free to formulate its independent judgment where, as here, the finding is an ultimate finding (*Stevenot* v.

Norberg, 210 F. 2d 615, 619 (C.A. 9); *Lehmann* v. *Acheson,* 206 F. 2d 592, 594 (C.A. 3)); involves a conclusion of law (*ibid; Himmel Bros. Co.* v. *Serrick Corp.,* 122 F. 2d 740, 742 (C.A. 7)); is induced by an error of law (*Atlantic & P. Tea Co.* v. *Supermarket Corp.,* 340 U.S. 147, 149–154; *Smallfield* v. *Home Ins. Co. of N.Y.,* 244 F. 2d 337, 341 (C.A. 9); *Magidson* v. *Duggan,* 212 F. 2d 748, 752 (C.A. 8), certiorari denied, 348 U.S. 883); is a determination of a mixed question of law and fact (*Fritz* v. *Jarecki,* 189 F. 2d 445, 448 (C.A. 7); *Noble Co.* v. *C. S. Johnson Co.,* 241 F. 2d 469, 475–476 (C.A. 7)); and is based on a stipulation of facts and undisputed evidence (*Kostelac* v. *United States,* 247 F. 2d 723, 726, fns. 1 and 3 (C.A. 9); *General Casualty Co.* v. *School District No. 5,* 233 F. 2d 526, 528 (C.A. 9); *Kwikset Locks* v. *Hillgren,* 210 F. 2d 483, 488–489 (C.A. 9), certiorari denied, 347 U.S. 989 and 348 U.S. 855; *Orvis* v. *Higgins,* 180 F. 2d 537, 539 (C.A. 2), certiorari denied, 340 U.S. 810; *Smith* v. *Royal Ins. Co.,* 125 F. 2d 222, 224 (C.A. 9), certiorari denied, 316 U.S. 695; *Equitable Life Assurance Soc.* v. *Irelan,* 123 F. 2d 462, 464 (C.A. 9); *Carter Oil Co.* v. *McQuigg,* 112 F. 2d 275, 279 (C.A. 7)). It is necessary, therefore, for us to give full consideration to the meaning of the word "willfully" as used in § 8a(5) of the Act.

The term "willfully" is a word "of many meanings, its construction often being influenced by its context" (*Spies* v. *United States,* 317 U.S. 492, 497), and in some statutes the term includes the element of evil motive or knowledge that the action is illegal. For example, "in view of our traditional aversion to im-

prisonment for debt, we would not without the clearest manifestation of congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability," is a willful violation subjecting the person to imprisonment. *Spies* v. *United States, supra,* 317 U.S. at 498. But as we have shown, *supra,* pp. 43–50, the term "willfully," at issue in this case, is used in remedial legislation, and should be liberally interpreted so as to deter violations.[26] With respect to statutory provisions similar to those in the Act involved in this case, the courts have held that a person who intentionally acts in a manner prohibited by the statute is a "willful" violator and proof is not necessary with respect to evil motive or knowledge that the action was illegal. Some of those decisions, apposite here, are referred to in the remainder of this subsection of our brief.

It was held in *Trenton Chemical Co.* v. *United States,* 201 F. 2d 776, 777–780 (C.A. 6), certiorari denied, 345 U.S. 994, that a Company, which exceeded its quota under a regulatory order establishing quotas as to grain used by distillers, "willfully" violated the quota restriction, subjecting it to criminal prosecution, inasmuch as it used grain in excess of its quota and had knowledge of the regulations and knowledge that the use of the grain was in excess of its quota.

[26] Even a penal statute is not to be interpreted so as to give to it the "'narrowest meaning.' It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress." *United States* v. *Raynor*, 302 U.S. 540, 552. See also, *Rainwater* v. *United States*, 356 U.S. 590, 592–593; *State of Colorado* v. *United States*, 219 F. 2d 474, 476 (C.A. 10).

The defendant contended that it used grain products, not grain, and "that it had been advised by its attorney that it was not illegal to use grain products in its distilling operations," but the "District Judge declined to permit the * * * [Company] to show at the trial that it acted in good faith and on advice of counsel that its acts were not illegal, in using the materials in question" (201 F. 2d at 778, 779). In sustaining the judgment of the District Court, the Court of Appeals held that inasmuch as the regulatory statute did not proscribe acts "in themselves wrong," evidence of "bad faith or evil purpose on the part of the defendant was not necessary to constitute a violation of the act, but it was sufficient if the prohibited act was intentional or voluntary" (201 F. 2d at 780).

Similarly, in *United States* v. *Perplies,* 165 F. 2d 874, 876 (C.A. 7), the Court held that a violation of the Emergency Price Control Act was "willful" if the "failure to comply with the regulation was intentional and deliberate and not merely by inadvertence or mistake" inasmuch as the offense did not involve moral turpitude. The same result was reached in an action for a violation of ceiling prices under the Defense Production Act of 1950 in *Nicastro* v. *United States,* 206 F. 2d 89, 92 (C.A. 10).[27]

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[27] In the *Nicastro* case, *supra*, in order to reduce the amount of the judgment, the burden was on the defendant—by the express terms of the Act—to prove that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. 206 F. 2d at 90, fn. 1. The reference in the Court's opinion, 206 F. 2d at 92, to the failure to seek legal advice relates to whether

In *Chicago, St. P.M. & O. Ry. Co.* v. *United States,* 162 Fed. 835, 840–842 (C.A. 8), certiorari denied, 212 U.S. 579, the Court upheld the conviction of the defendants under the Elkins Act on the ground that they "willfully" granted rebates to a shipper, notwithstanding the reliance by the defendants on decisions by the Interstate Commerce Commission which, according to the Court, "might well have afforded ground for belief by defendants that their act * * * was justifiable and lawful" (162 Fed. at 840–841). Specifically, the Court said that to "hold that the belief of an individual concerning the legality of his action should constitute a standard of innocence or guilt would establish an uncertain and dangerous doctrine. It would in many cases justify a violation of statutes expressive of public policy concerning which there may obviously be and frequently are as many different opinions as there are different individuals affected by them" (*Id.* at 842).[28] See also, *Armour Packing Co.* v. *United States,* 209 U.S. 56, 70–71, 85–86; and *United States* v. *Union Pac. R. Co.,* 169 Fed. 65, 67 (C.A. 8).

In a case involving an offense *malum prohibitum,* as contradistinguished from an offense *malum in se,* bad intent or evil motive is not an attribute of liability on a charge of having "willfully" violated the statute. *Riss & Company* v. *United States,* 262 F. 2d 245, 247–251 (C.A. 8). Elaborate precautions against a viola-

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the defendant took practicable precaution against the occurrence of the violation, and not as to whether the offense was willful. *Ibid.*

[28] This case was relied on by the Court in *Riss & Company* v. *United States*, 262 F. 2d 245, 248 (C.A. 8).

tion of the statute are not sufficient as a defense. *Ibid.* A corporation or a partnership may be adjudged guilty, in a criminal proceeding, of "willfully" violating the statute because its employees or agents failed to comply with the employer's "elaborate and comprehensive program designed to insure compliance" with the law. *Ibid.*

The word willful, "even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." *American Surety Co.* v. *Sullivan,* 7 F. 2d 605, 606 (C.A. 2), opinion by Judge Learned Hand. The Court recognized in *Browder* v. *United States,* 312 U.S. 335, 342, that "the word 'willful' often denotes an intentional as distinguished from an accidental act," and the Court held that a person who procures a passport by reason of a false statement, and uses the passport to prove citizenship on reentry to this country, is properly convicted under the criminal statute prohibiting a person from "willfully and knowingly" using the passport (312 U.S. at 336–342). The Court rejected the defendant's contention that inasmuch as the use of a passport is not required of citizens on reentry, and that because he had "no ulterior evil purpose in mind," his use of the passport was not a "willful" use, within the meaning of the statute. *Ibid.* Specifically, the Court held that "[o]nce the basic wrong under this passport statute is completed, that is the securing of a passport by a false statement, any intentional use of that passport" is willful. 312 U.S. at 342.

Similarly, in *Fields* v. *United States,* 164 F. 2d 97, 99–101 (C.A.D.C.), certiorari denied, 332 U.S. 851, in sustaining the defendant's conviction under the criminal statute relating to a "willful" failure to furnish records to a congressional committee, it was held that the word "willful" does not mean that the refusal to comply with the order of the committee must be for an evil or a bad purpose, and that the "reason or the purpose of failure to comply or refusal to comply is immaterial, so long as the refusal was deliberate and intentional and was not a mere inadvertence or an accident." The rationale of the *Fields* case was applied in the similar case of *Dennis* v. *United States,* 171 F. 2d 986, 990–991 (C.A.D.C.), affirmed on other grounds, 339 U.S. 162, and the Court held in the *Dennis* case, in addition, that the mere fact that the defendant claimed to have followed the advice of counsel "is no defense. If it were, many corporations, organizations and even individuals would maintain counsel permanently for the purpose of advising them against doing anything that they do not wish to do" (171 F. 2d at 991).

In *United States* v. *Gris,* 247 F. 2d 860, 864 (C.A. 2), the defendant was convicted of "willfully and knowingly" intercepting and divulging telephone communications in violation of the Federal Communications Act. The conviction was affirmed notwithstanding the defendant's contention that he was tapping the telephone of a client's wife, on behalf of the client, and that it is not a violation of the State law for a subscriber to tap his own line (247 F. 2d at 864). The Court held: "It matters not whether

appellant realized his conduct was unlawful. He knew exactly what he was doing; and what he did was a violation of the Federal Communications Act. He intended to do what he did, and that is sufficient." *Ibid.*

The decisional law supports our interpretation of the word "willfully" in § 8a(5) of the Act, and if the regulatory program is to be effective it is necessary that the term "willfully" be interpreted in accordance with the decisions to which we have referred. As we have shown, *supra,* pp. 43–50, the success of the program is dependent upon effective enforcement. The regulatory features of the program necessarily impose restrictions on the regulated groups, and it is likely that a handler in some area will, from time to time, feel that the incidence of the regulation on him is more severe than on others.[29] Whenever surplus fruit must be disposed of for less than could be obtained in the fresh fruit market some handlers may seek to ship their excess fruit to the fresh fruit market, and they may endeavor to obtain advice which would permit the desired shipment of fruit. If the Government must prove, in an action under § 8a(5), not only that the handler intentionally shipped fruit, knowing that the shipment was in excess of his quota, but also that the handler had an evil motive or knew that he was violating the law, the remedial purpose of the Act will be thwarted.[30] The remedial measure

[29] See, *e.g., Secretary of Agriculture* v. *Central Roig Co.*, 338 U.S. 604, 618, in which it was argued that certain sugar quotas were unfair and "disadvantageous to certain areas or persons."

[30] Here, as in *Woolford Realty Co.* v. *Rose*, 286 U.S. 319, 330, the mind rebels against an interpretation which would foster

is not to be given a devitalizing interpretation, *supra,* pp. 49–50.

C. Assuming, *arguendo,* that the filing of an administrative petition under § 8c(15)(A) of the Act, "in good faith and not for delay," or that reliance, in good faith, on erroneous advice is a bar to an action for civil penalties under § 8a(5) of the Act, nonetheless the defendants are, on the basis of the admitted facts in this case, liable for civil penalties under § 8a(5)

Assuming, *arguendo,* that our interpretations of the Act, *supra,* pp. 33–58, are erroneous, nonetheless the undisputed facts show that the defendants willfully shipped oranges on April 7 and 8, 1956, in excess of their allotments and are liable for civil penalties under § 8a(5).

The proviso in § 8c(14) is, by its terms, applicable only if the petition under § 8c(15)(A) is "filed and prosecuted by the defendant in good faith and not for delay * * *." 7 U.S.C. 1952 ed. § 608c(14). The criterion of "good faith," in a statutory provision which relieves a person from liability if his conduct is in good faith, includes "not only personal upright mental attitude and clear conscience, but also intention to observe legal duties." *Kiyoichi Fujikawa* v. *Sunrise Soda Water Works Co.,* 158 F. 2d 490, 494 (C.A. 9), certiorari denied, 331 U.S. 832. The proviso in § 8c(14) of the Act contains conjunctive conditions, *viz.,* "in good faith and not for delay." The stipulation of facts and the undisputed evidence in the record in the case at bar show that the petition under § 8c(15)(A) was not filed in good faith and, also, that it was filed for delay.[31]

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the opportunity of evasion. "Expediency may tip the scales when arguments are nicely balanced." *Ibid.*

[31] The proviso in § 8c(14) should not be interpreted so as to enable violators to escape all penalties by merely filing a peti-

Mr. Woodall, Sales Manager of Lo Bue Brothers, told the Navel Orange Administrative Committee on March 29 that he "intended to move his fruit, to ship his fruit in one way or another, and he would find some way to do it" (R. 146). The manager of the Administrative Committee testified that "I told him * * * he must understand it was my job [as manager] to catch him if he shipped in excess of the allotment, and he said, 'Well, I ain't going to tell you what I am going to do' " (R. 154).

Mr. Woodall then consulted with an attorney, G. V. Weikert, Esq., and received the advice that if a petition under § 8c(15)(A) is filed "in good faith," the quota or allotment complained of is, in effect, suspended until there is a decision on the petition, and the handler is exempted from the penalties prescribed by the Act (R. 182). However, the undisputed evidence shows that the petition under § 8c(15)(A) was filed only for the purpose of permitting the defendants to ship their excess fruit (R. 106, 109–113, 117–123, 141–143, 145–155). Specifically, Mr. Mario Lo Bue (the managing partner in the defendant business concern) testified that the "only" reason for filing the administrative petition under § 8c(15)(A) was "because the fruit was going bad" (R. 121).

After the excess shipments were completed by the defendants, little interest was shown by the defendants with respect to the petition for administrative

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tion under § 8c(15)(A) although the grounds in such a petition are without substantial merit. See, *e.g.*, *Provident Mut. Life Ins. Co.* v. *University Ev. L. Church*, 90 F. 2d 992, 995 (C.A. 9), quoting from *In re Tennessee Pub. Co.*, 81 F. 2d 463, 466 (C.A. 6), affirmed on other grounds, 299 U.S. 18.

review under § 8c(15)(A) of the Act. Mr. Woodall did not remember whether he saw or communicated with Mr. Weikert during the period from the filing of the petition for administrative review to the time of the hearing (R. 174–178). The decision on the administrative petition was adverse to the defendants (R. 88, 331–348). It was held by the Judicial Officer,[32] in dismissing the petition under § 8c(15)(A), that the contested regulations were "reasonable" (R. 343), that the quotas "reflected the particular conditions prevailing in the area" (R. 343), and that the "restrictions imposed were instrumental in attaining excellent returns to growers for the 1955–1956 crop" (R. 344), and there was "no evidence of discrimination against petitioner [*i.e.,* Lo Bue Brothers] in the record" (R. 345). "In fact, petitioner [*i.e.,* Lo Bue Brothers] marketed almost five percent more of its 1955–1956 crop in fresh fruit channels than the average marketed by handlers and producers from Southern California," in that marketing season, and also marketed a higher percentage of its navel oranges "in fresh market channels than the average marketed by handlers in Central California" (R. 345). "[A]ny price differential between Southern and Central California navel oranges appears to have resulted from the characteristics of the two crops rather than the time of marketing of the respective crops" (R. 345–346).

Although the proceeding on the petition under

[32] The Judicial Officer acted for the Secretary of Agriculture pursuant to authority delegated to the Judicial Officer. 10 F.R. 13769; 11 F.R. 177A–233; 18 F.R. 3219, 3348; 19 F.R. 74.

§ 8c(15)(A) was not moot as a matter of law,[33] no appeal was taken from the administrative decision (R. 28). The petition under § 8c(15)(A) was, allegedly, for the purpose of obtaining permanent relief from the administrative action alleged to be illegal, *viz.*, the regulation of the shipments of navel oranges "beyond their historical life" (R. 26–27, 333–334), and the prayer in the petition was, *inter alia*, that the regulatory order be modified so "as to prevent a repetition in the future of the situation complained of * * *" (R. 27). But on April 19, 1956, only 10 days after the petition under § 8c(15)(A) was filed and prior to the hearing on the petition, "a consent decree" was entered in District Court "for [a] permanent injunction enjoining them [*i.e.*, the defendants]"

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[33] A proceeding to review an administrative rule or order, which administrative action is of such short duration that it expires before the review proceeding is terminated, is not moot if the legal issue involved is relevant in the future administration of the program. *Federal Trade Comm'n* v. *Goodyear Co.*, 304 U.S. 257, 259–260; *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 413–414; *Southern Pac. Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 514–516; *Gay Union Corp.* v. *Wallace*, 112 F. 2d 192, 195 (C.A.D.C.), certiorari denied, 310 U.S. 647; *Boise City Irr. & Land Co.* v. *Clark*, 131 Fed. 415, 418–419 (C.A. 9). See, *e.g.*, *Secretary of Agriculture* v. *Central Roig Co.*, 338 U.S. 604, in which the Court in 1950 passed on the validity of the 1948 sugar quotas. Moreover the shipments in excess of the quotas, in the case at bar, subjected the defendants to suit for civil penalties, and if the quotas were illegal that contention could be advanced by the defendants only by means of an appeal under § 8c(15)(B) of the Act from the decision of the Judicial Officer pursuant to § 8c(15)(A). See, *supra*, fn. 20, p. 44. The Judicial Officer, in disposing of the petition under § 8c(15)(A), held that the proceeding is not moot (R. 339–340).

from violating the regulatory order or regulations properly issued pursuant thereto (R. 28, 88–89).

In the circumstances, it is plain that, as Mr. Lo Bue testified, the "only" purpose of filing the petition for administrative review was "because the fruit was going bad" (R. 121), and the defendants wanted to ship the excess fruit (R. 106–122). In addition, the circumstances with respect to the failure to be sure that the petition for administrative review had been "filed" on Friday, April 6, is indicative of the defendants' resolute determination to ship their excess fruit on the weekend of April 7 and 8 irrespective of whether they were in compliance with the law.

The time pattern of the relevant circumstances is evincive of the defendants' intention to ship their excess fruit irrespective of the applicable quotas. The administrative petition was mailed in Los Angeles on Thursday, April 5 (R. 25, 85), and obviously it could not have been received and filed in Washington, D.C., until at least a day or two later. It was not, however, sent by air-mail, special delivery, but by registered air mail (R. 35, 85). It is "general knowledge" that "registered mail * * * is not always delivered so promptly as is the case with ordinary mail." *Weaver* v. *United States,* 72 F. 2d 20, 21 (C.A. 4). Mr. Lo Bue was advised by Mr. Weikert that he "would probably be served an injunction" (R. 108), but Mr. Lo Bue did not expect the injunction to be served during the weekend of April 7 and 8, when the excess shipments involved in this case were made (R. 118–120). Twenty-three of the excess shipments involved in this case occurred

on Saturday, April 7, shortly after midnight, and the three remaining shipments occurred on Sunday, April 8, shortly after midnight (R. 33–34, 108–110). Sales had previously been made with respect to the navel oranges in only two of the excess shipments, and the other 24 shipments were started in transit unsold (R. 110–111).

Assuming, *arguendo,* the relevancy of the exemption in § 8c(14) of the Act, relied on by the defendants, the exemption is applicable only to such violations "as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant * * *." 7 U.S.C. 1952 ed. § 608c(14). A petition for administrative review pursuant to § 8c(15)(A) of the Act is "deemed to be filed when it is received by the [H]earing [C]lerk" in the Department in Washington, D.C. 7 CFR § 900.69(d). The regulation is decisive in this respect, but in similar situations it has been held that a paper is filed with a governmental agency when it is actually delivered to the agency, and not when it is deposited in the post office for delivery. *United States* v. *Lombardo,* 241 U.S. 73, 76–77; *United States* v. *Peters,* 220 F. 2d 544, 545 (C.A. 10); *McRae* v. *Woods,* 165 F. 2d 790, 790–791 (Emerg. C.A.), certiorari denied, 333 U.S. 882; *Poynor* v. *Commissioner of Int. Rev.,* 81 F. 2d 521, 522 (C.A. 5); *Modern Engineering Co.* v. *United States,* 113 F. Supp. 685, 687 (Ct. Cl.). Admittedly, however, as found by the District Court, the defendants' petition under § 8c(15)(A) was not "filed," *i.e.,* "received," in the office of the Hearing

Clerk in the Department in Washington, D.C., "until in the afternoon of [Monday] April 9, 1956" (R. 87). The excess shipments, however, were made on April 7 and 8 (R. 33–34, 108–110).

Mr. Weikert made it plain, in his advice to the defendants, that the petition must be "filed" (R. 182–186). Specifically, Mr. Weikert testified that he advised the defendants that "where a 15(A) petition is filed" in good faith, the exemption from penalties is applicable (R. 182), and that the defendants could ship their oranges "only after the filing in good faith of a 15(A) petition" (R. 186). Mr. Lo Bue also testified that he was advised by Mr. Weikert that by "filing a 15(A)" the oranges could be shipped without penalty (R. 107). Similarly, Mr. Woodall testified that Mr. Weikert said that the only way to ship the fruit was by "filing" a (15)(A) petition, and that as "soon as the 15(A) petition was filed," the oranges could be shipped (R. 160). It cannot, therefore, be gainsaid that the defendants knew that the petition must be "filed" before they could begin to ship their excess oranges. In other words, the defendants knew that they would be subject to statutory penalties if the excess shipments occurred prior to the filing of the administrative petition.

The defendants knew that the petition was not mailed until Thursday, April 5 (R. 123, 186). In fact, the petition was signed by Mr. Lo Bue in Mr. Weikert's office in Los Angeles on Thursday, April 5 (R. 123, 183, 186). Hence Mr. Lo Bue knew that to be in compliance with what he had been advised was an exemption from the penalty provisions of the

Act, the administrative petition had to be filed with the Secretary on the following day to be applicable to the shipments in this case. Although Mr. Weikert advised the defendants on Friday that "by now the petition would be on file with the Secretary of Agriculture," (R. 183), the defendants knew that the petition had been mailed on Thursday, April 5, and if the defendants had wanted to know whether the administrative petition had been "filed," they could easily have verified the fact by telephone or requested Mr. Weikert to verify the fact that the petition had actually been filed with the Hearing Clerk in the Department in Washington, D.C., but no such telephone call was made (R. 186).

The additional effort or expense with respect to a verificative telephone call would have been insignificant compared with the effort and expense already undertaken by the defendants. Mr. Woodall and Mr. Lo Bue had both gone to Los Angeles to confer with Mr. Weikert and, also, they had conferred with Mr. Weikert by telephone (R. 106–107, 156–158, 181–183). In addition, they had incurred the expense of having the administrative petition prepared. The additional telephone call would have been a trivial expenditure in order to be sure that the petition was on file.[34]

The conclusion is, we submit, inescapable that the defendants were not interested in verification with respect to whether the petition for administrative re-

[34] If the Department had known about the defendants' plan to ship the fruit in excess of the quotas, appropriate steps could have been taken at once to obtain a temporary restraining order in District Court.

view, under § 8c(15)(A), had been filed. The filing of the petition is the vital factor in the defendants' theory of statutory interpretation, but in this vital respect there was no effort by the defendants to ascertain whether the petition had been filed. The excess shipments were made on April 7 and 8, although the petition was not filed until April 9. These circumstances in conjunction with the other factual circumstances in the record warrant the view that the mailing of the petition was merely a maneuver or stratagem on the part of the defendants.[35]

To be sure, the District Judge made the ultimate finding or conclusion that the defendants did not "willfully" ship oranges in excess of their quotas or allotments (R. 90–91). But the "phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment. Such a 'finding of fact' may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness

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[35] The District Court states in its memorandum decision (R. 64) and in its findings of fact (R. 88) that the Judicial Officer "refused" to make any finding as to whether the defendants' petition for administrative review was filed in good faith and not for delay, but the Judicial Officer states, in his decision with respect to the administrative petition, that the "record in this proceeding contains some evidence of lack of good faith. * * * However, since we are dismissing the petition upon the merits, we do not feel it necessary also to conclude that the petition should be dismissed for lack of good faith and, therefore, no finding or conclusion is made on this part of the case insofar as this proceeding is concerned" (R. 347).

of a 'finding of fact' depends on the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. * * * Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court." *Baumgartner* v. *United States,* 322 U.S. 665, 670–671. The finding, in the case at bar, that the defendants did not "willfully" ship in excess of the quotas is a conclusional or ultimate finding, involves a determination of a mixed question of fact and law, and is based on a stipulation of facts and undisputed testimony. As we have shown, *supra,* pp. 50–51, the so-called finding as to willfulness is a matter with respect to which this Court should formulate its independent judgment.

The defendants' shipments of excess fruit were, in view of the stipulation of facts and the undisputed evidence, willful. The facts, as shown by the record, firmly support that conclusion. The factual support is so strong that if it is assumed, *arguendo,* that the ultimate finding by the lower court as to willfulness may be set aside, on appeal, only if the finding is regarded, strictly, as a finding of fact and if it is clearly erroneous, nonetheless the record warrants the setting aside of the finding. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the

definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.*, 333 U.S. 364, 395.

CONCLUSION

The judgment of the District Court should be reversed and the case remanded with directions to enter judgment for the United States in accordance with the prayer of the complaint.

GEORGE COCHRAN DOUB,
Assistant Attorney General,
LAUGHLIN E. WATERS,
United States Attorney,
JORDAN A. DREIFUS,
Assistant United States Attorney,
ALAN ROSENTHAL,
Attorney,
United States Department of Justice.

NEIL BROOKS,
Assistant General Counsel,
JOHN S. GRIFFIN,
DONALD A. CAMPBELL,
Attorneys,
United States Department of Agriculture.

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